IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:- 27.10.2006

Coram:-

The Hon'ble Mr. Justice P.SATHASIVAM
and
The Hon'ble Mr. Justice S.MANIKUMAR

W.P. Nos.15791 to 15795 of 2006
and
WPMP Nos.15547 to 15551 of 2006

P.Sivanandi, IPS,
Deputy Inspector-General of Police (HQrs),
Chennai 600 004 ... Petitioner in all WPs.

vs.

Rajeev Kumar, IPS,
Superintendent of Police,
Narcotic Intelligence Bureau,
CID (NIB-CID), Chennai. ... R-1 in WP.15791/2006

Sandeep Rai Rathore, IPS,
Superintendent of Police,
Thoothukudi District,
Tamil Nadu. ... R-1 in WP.15792/2006

Abhay Kumar Singh, IPS,
Superintendent of Police,
Crime Branch-I, CID,
Chennai-600 002. ... R-1 in WP.15793/2006

K.Vanniya Perumal, IPS,
Commandant, Tamil Nadu,
Special Police-VII Battalion,
Palani, Dindigul District. ... R-1 in WP.15794/2006

Shailesh Kumar Yadav, IPS,
Passport Officer, Ghaziabad,
Ministry of External Affairs,
Govt. of India,
Patiala House, New Delhi. ... R-1 in WP.15795/2006

The Union of India rep. by
the Secretary,
Ministry of Home Affairs,
North Block, New Delhi. ... R-2 in all WPs.

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Union Public Service Commission
Represented by its Secretary,
New Delhi. ... R-3 in all WPs.

The State of Tamilnadu rep.
by its Principal Secretary,
Home Department, Fort St. George,
Chennai 600 009. ... R-4 in all WPs.

The Director General of Police,
Tamil Nadu, Mylapore,
Chennai-600 004. ... R-5 in all WPs.

S.Avudayappan, IPS.,
Superintendent of Police,
Special Division, SB CID,
Chennai 600 004. ... R-6 in all WPs.

The Central Administrative Tribunal
represented by its Registrar,
Madras Bench, Chennai 600 104. .. R-7 in all WPs.

Petitions under Article 226 of the Constitution of India for the issuance of a writ of certiorari to call for the records relating to the common order of the Central Administrative Tribunal, Madras Bench, in OA Nos.595 to 598 and 780 of 2005, dated 05.05.2006, and quash the same.

For Petitioner in WP.15791/06 : Mr.N.R.Chandran, Senior Counsel for Mr.S.Arivazhagan.

For Petitioner in WP.15792/06 : Mr.Vijaynarayan, Senior Counsel for Mr.S.Arivazhagan.

For Petr. in WPs.15793 to 15795/06 : Mr.L.Chandrakumar for Mr.S.Arivazhagan

For R1 in WP.15791/06 : Mr.Sathyanarayanan

For R1 in WPs.15792 to 15795/06 : Mr.I.Subramanian, Senior Counsel for Mr. P.N. Swaminathan

For R2 in all WPs : Mr.V.T.Gopalan, Addl. Solicitor General, assisted by Mr.P.Wilson, Asst. Solicitor General and Mr. P. Kumaresan,ACGSC.

For R-3 in all WPs : Mr.R.Muthukumarasamy, Senior Counsel for Mr.K.Sridahar, Senior Central Govt. Standing Counsel.

For State of Tamil Nadu in all WPs : Mr.R.Viduthalai, Advocate General, assisted by Mr.K.Elango, Special Government Pleader.

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COMMON JUDGMENT

(Judgment of the Court, delivered by P.SATHASIVAM, J.)

The petitioner in all these petitions challenges the common order of the Central Administrative Tribunal, Madras Bench, in O.A. Nos.595 to 598 and 780 of 2005, dated 05.05.2006, in and by which, the Select List of 1994-1995 as finalised in 1999 for selection and appointment to Indian Police Service was set aside by the Tribunal insofar as petitioner P.Sivanandi and 6th respondent S.Avudayappan are concerned.

2. The case of the petitioner, as stated in the affidavit, is briefly stated here-under.

(a) By G.O.Ms.No.1119 (Home Department) dated 06.05.1985, on the basis of the Group-I Services Examinations conducted by the Tamil Nadu Public Service Commission, the petitioner was directly selected and recruited as Deputy Superintendent of Police along with 12 others as part of the 1982-83 Batch. On 27.05.1985, the entire batch joined the Police Training College, Madras. Recruitment to the post of Deputy Superintendent of Police was from two sources, one by direct recruitment and the other by promotion from the post of Inspector of Police. While the petitioner was undergoing training, 91 Inspectors of Police appointed as Deputy Superintendents of Police temporarily under Rule 10(a)(i) of the Tamil Nadu State and Subordinate Service Rules during 1982-1983 were regularized with retrospective effect from the dates of temporary appointment and the same was done as per G.O.Ms. No.860, dated 03.10.1985. In the Seniority List issued on 01.01.1986, those 91 promotees of 1982-83 along with 1984-85 batch of promotees were placed above the direct recruits of the 1982-83 batch, who were appointed by virtue of G.O.Ms.No.1119 dated 06.05.1985.

(b) The petitioner and other direct recruits made representations and, by G.O.Ms.No.931 dated 2.5.1990, an order was issued by which the direct recruits were placed above the promotees. Aggrieved by the said Order, the promotees filed applications before the Tamil Nadu Administrative Tribunal in O.A. Nos.1295 and 1332 of 1990. While the said Applications were pending, the Government of Tamil Nadu issued G.O.Ms.No.1717, dated 19.07.1990, cancelling the earlier order issued in G.O.Ms.No.931 dated 21.05.1990. The effect of the order was that the promotee officers again gained seniority over the direct recruits. Aggrieved by the order dated 19.07.1990, cancelling the earlier order in favour of the direct recruits, one Christopher Nelson filed O.A. No.2073 of 1990 before the Tamil Nadu Administrative Tribunal. One person from the 1984-85 batch of promotees also filed O.A. No.4012 of 1990. On 24.07.1991, a common order was passed by the Tamil Nadu Administrative Tribunal in O.A. Nos.1295 and 1332 of 1990, by which, the Applications filed by the promotee officers were allowed and the application filed by Christopher Nelson, the directly recruited Deputy Superintendent of Police, was dismissed.

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(c) Aggrieved by the said Order, Christopher Nelson filed SLP Nos.17086-89 of 1991 and, by order dated 05.01.1995, the Supreme Court set aside the order of the Tribunal and directed the Tribunal to pass fresh orders in the light of the decision of the Supreme Court in Syed Khalid Rizvi and others vs. Union of India and others (1993 Supp. (3) 575). By the said order, four matters were remanded back to the Tamil Nadu Administrative Tribunal. Thereafter, the matters were taken up for final hearing and, by order dated 26.06.1995, the applications filed by the promotee officers were dismissed and the one filed by the direct recruits was allowed, thereby, G.O.Ms.No.931, Home Department, dated 2.5.1990, was restored and the direct recruits were placed above the promotees.

(d) While the above Original Applications were pending after remand and after the interim order was passed by the Tamil Nadu Administrative Tribunal, on 02.02.1995, in violation of the interim order, the Select Committee for making selections to the Indian Police Officers met on 07.03.1995 and prepared a select list consisting of 11 officers of the State Civil Services. The said list was totally illegal since it was admittedly in violation of the interim order passed by the Tamil Nadu Administrative Tribunal. Subsequently, UPSC (Union Public Service Commission) approved the said List on 28.04.1995. On that basis, the persons at Serial No.1 to 8 were recommended for appointment subject to the result of O.A. No.1273 of 1990. In the meanwhile, on 26.06.1995, O.A. No.1273 of 1990 was allowed and O.A. Nos.1295, 1332 and 4012 of 1990 were dismissed and consequently, the Select List itself had to be revised since the seniority in the feeder cadre had been altered. Aggrieved by the same, the State Government filed a Review Application before the Tamil Nadu Administrative Tribunal and the same was dismissed on 19.01.1996. Two promotee officers filed SLPs before the Supreme Court and the same were dismissed on 11.09.1995.

(e) In the meanwhile, on 26.09.1995, the petitioner, who was considered for appointment to the Indian Police Service but not included in the select list, approached the Central Administrative Tribunal by filing O.A. No.1154 of 1995. In view of the dismissal of the SLP as well as rejection of the Review Applications, on 19.5.1997, the Government of India issued a Notification, modifying the Select List by re-arranging the officers in accordance with the revised seniority as published by the State Government in accordance with the judgment of the Tamil Nadu Administrative Tribunal. A number of applications had been filed, challenging the original Select List, before the Central Administrative Tribunal including O.A. No.1154 of 1995 filed by the petitioner and those applications came to be allowed by the Central Administrative Tribunal on 22.08.1997.

(f) As a result of these proceedings, the entire original selection was vitiated and the respondents had been asked to undertake the entire exercise afresh. Aggrieved by the said Order, Christopher Nelson filed W.P. Nos.14142 to 14148 of 1997 and one S.S.Krishnamoorthy filed W.P. Nos.16712 to 16714 of 1997. Those Petitions came to be disposed of by a Division Bench on 07.11.1997, upholding the judgment of the Central Administrative Tribunal.

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(g) In the meanwhile, Christopher Nelson withdrew W.P. Nos.14142 to 14148 of 1997 with liberty to prefer appeals before the Supreme Court and thereafter, he filed SLP Nos.22795-801 of 1997 against the judgment of the Central Administrative Tribunal dated 22.08.1997. Though the Hon'ble Supreme Court granted interim orders, however, clarified to the effect that the interim order will not prevent the State from holding the DPC (Departmental Promotion Committee). In view of the order of the Central Administrative Tribunal, dated 22.08.1997, and the order of the Hon'ble Supreme Court, a fresh Select Committee Meeting was held on 23.03.1999 to prepare and review the Select List of 1994-95 and the said Select Committee recommended 11 names. The said List prepared by the Select Committee was forwarded to the UPSC and the same was approved by it on 14.07.1999 subject to the final outcome of the batch of cases pending before the Supreme Court. Thereafter, the Supreme Court on 20.02.2002 delivered its final Judgement, declining to interfere with the impugned order and dismissed all the Appeals. In view of the final order, the recommendations of the Select Committee approved by the UPSC on 14.07.1999 had to be notified and accordingly, on 30.01.2004, a fresh notification was issued appointing 10 officers to the Indian Police Service. The petitioner was at Serial No.3 in the said list and therefore, was appointed to the Indian Police Service from 03.11.1995. The petitioner was therefore deemed to be in the original Select List which was prepared on 07.03.1995.

(h) Aggrieved by the fresh selection process, the first respondent and others filed O.A. Nos.1106 to 1109 of 2004 and the same were disposed of by order dated 11.4.2005, directing the Government of India to consider the representation made by the first respondent and others and pass appropriate orders. On the basis of those representations, orders were passed by the Government of India on 09.06.2005 and it is to challenge the said order as well as the orders dated 30.1.2004 and 26.3.2004, fresh applications were filed. The petitioner filed a counter bringing all the facts and circumstances of the case to the notice of the Tribunal and also took a stand that the 1st respondent and others, who have filed the applications, did not have locus standi since they were direct recruits and were appointed to the service from a different stream. They do not have the right to challenge the selection of State Police Officers.

(i) By Order dated 05.05.2006, the applications were allowed only on the ground that the ACR (Annual Confidential Report), which was written after 31.03.1994, would not be valid in the eye of law as it was written later though it related to the said period and therefore, consideration of such ACR for the relevant period, since it was written later, would be illegal and the selection was vitiated. The Tribunal found from the File that for the period from 01.04.1993 to 15.07.1993, the report was written on 14.11.1994 and the same was reviewed on 19.01.1996 and accepted on 27.01.1996. Hence, the report was not written in accordance with the instructions, which laid down a time frame for writing of the ACRs and therefore such a report ought not to have been taken into consideration and consequently, the selection was vitiated. It also took the view that

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this additional ACR had the effect of changing the over-all grading of the petitioner and hence, the said report ought not to have been taken into consideration. In the said Order, the Tribunal, after quashing the Select List of 1994-95 as finalised in 1999, directed respondents-1, 2 & 3 therein to re-do the Select List for 1994-95 strictly by considering only the records that ought to have been considered instead of any record that might have been written far later than the relevant cut off date, viz., 31.03.1994. Aggrieved by the said order, having no other efficacious alternative remedy, the petitioner has filed the above Writ Petitions for the issuance of a writ of certiorari.

3. Heard Mr.N.R.Chandran, Mr.Vijaynarayan, learned Senior Counsels and Mr.L.Chandrakumar, learned counsel for the petitioner; Mr.I.Subramanian, learned Senior Counsel for R-1 in WPs.15792 to 15795 of 2006; Mr.V.T.Gopalan, learned Additional Solicitor General for Government of India; Mr.R.Muthukumaraswamy, learned Senior Counsel for the Union Public Service Commission; Mr.R.Viduthalai, learned Advocate General for State of Tamil Nadu; and Mr.Sathyanarayanan, learned counsel for R-1 in WP.15791 of 2006.

4. Mr.N.R.Chandran and Mr.Vijaynarayan, learned Senior Counsels appearing for the petitioner, assailing the Order of the Tribunal, contended that the finding of the Tribunal, viz., assessment beyond 3 to 6 months' period should not be countenanced, is not supported by any legal principle or statutory Rule or Order. According to them, ACR being vital document for advancement in the service career of a Government Servant and the same being written by the superior officers, viz., reporting officer, reviewing officer and accepting officer; and in view of the fact that the Government servant has no role in the matter of writing of the ACR; to hold that belated ACR should not be taken into account to consider the claim of the Government servant would violate his fundamental right guaranteed under Article 16 of the Constitution of India. In other words, according to them, because of the delay on the part of the higher officials, the service career of a Government servant should not be let affected. Both the counsels further contended that, having supported their own orders before the Tribunal, the present stand of the Government of India and the State Government that the Tribunal's order was right and a belated ACR ought not to have been taken into account is not tenable. According to them, inasmuch as the Tribunal directed the authorities to go through the entire process of preparation of panel for the year 1994-1995 afresh, which was confirmed by the Supreme Court, it necessarily follows that the Supreme Court approved all the findings and directions of the Tribunal and, therefore, the proceedings for preparation of 1994-95 panel should be done de novo without any limitation. They further submitted that the principles of res judicata and constructive res judicata would not apply to the cases on hand. Inasmuch as the directly recruited DSPs and IPS Officers are recruited under different streams of Rules against different vacancies, both are mutually independent and appointment of one stream cannot prejudice others. According to them, the applicants in the Original Application/R-1 in these Writ Petitions have no locus standi to challenge the notification dated 30.01.2004 as they were not qualified to

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be included in the panel as promotees and they came to be appointed to the service through a different stream. With regard to the ACR for the period between 01.04.1993 and 15.07.1993, as per the information furnished by the UPSC, the same had not changed the grading from 'good' to 'very good' but it is the ACR for the period 1992-1993 that had changed the grading from 'good' to 'very good', and, as a result of the overall assessment, the petitioner has been correctly included in the 1994-95 Select List, hence, the entire order of the Central Administrative Tribunal becomes erroneous and is liable to be set aside. They also contended that a person in compulsory wait is deemed to be on duty and, in this case, the petitioner was assisting his senior officers. Inasmuch as the period of compulsory wait was regularised as duty vide G.O.Rt.No.2994 Home (Police-II) Department, dated 14.10.1973, the Tribunal ought not to have rejected the assessment of ACR for the said period. Finally, it is contended that the re-evaluation of the committees' findings by the Court is not permissible unless they are made contrary to the Rules or where an allegation of mala fides and bias against the committee members is alleged.

5. Mr.R.Muthukumarasamy, learned Senior Counsel for the Union Public Service Commission, by placing the original records, ie., materials placed before the Select Committee and the decision taken by them, contended that the reasoning and conclusion of the Tribunal that the Union Public Service Commission decided on the basis of impermissible documents to improve the grading given to the petitioner are baseless and contrary to the facts on record. He demonstrated that, when the ACR for the said period, viz., 01.04.1993 to 15.07.1993, was made available before the Select Committee held on 24.3.1999, the Committee did not change the grading for the year 1993-94. The finding of the Tribunal to the contra as found recorded in para No.21 cannot be sustained. In such circumstances, according to him, the question as to the validity of the ACR for the period from 01.04.1993 to 15.07.1993 and as to whether it could be lawfully taken into account is wholly irrelevant. From the records, he pointed out that the change in the grading given by the Select Committee to the petitioner for the year 1992-93 as 'very good' as against the grading 'good' given by the Committee in the Meeting held on 07.03.1995 was on account of the fact that the missing ACR for a part of the year 1992-93 had been made available in 1999. In other words, according to him, the change in the overall grading in so far as the petitioner in the Meeting held on 24.3.1999 was on account of the change in the grading for the year 1992-93 and not 1993-94. He finally submitted that the UPSC is entitled to put forth the decision of the Select Committee through their counsel and their action is in accordance with law. Further, it is open to the UPSC, who has been impleaded in the Petition, to submit its views and bring it to the notice of the Court the correct facts on the position of law.

6. Mr.I.Subramanian, learned Senior Counsel appearing for R-1 in the W.Ps., by drawing our attention to various factual details, supported the order passed by the Tribunal. He submitted that, in the case on hand, ACRs were written belatedly, hence, the authenticity of those documents is

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very much doubtful, which has resulted in prejudice to R-1 in the Writ Petitions. Accordingly, he prayed for confirmation of the order of the Tribunal and dismissal of the Writ Petitions.

7. Mr.V.T.Gopalan, learned Additional Solicitor General, contended that materials/reports, which were written far later than the relevant cut off date viz., 31.3.1994, were taken into consideration to make the Select List for the year 1994-1995, hence, the same were rightly directed to be eschewed by the Tribunal. He further contended that the documents, which have come into existence subsequent to the said cut off date, cannot be taken into account as otherwise the cut off date loses its sanctity and persons competing to be promoted could keep on claiming additional qualifications by the passage of time. He further contended that non-availability of the ACR for the limited period from 01.04.1993 to 15.07.1993 was not an issue before the Tribunal at all in the earlier occasion and that, in view of the order passed by the Supreme Court, the principle of constructive res judicata is applicable to the cases on hand. He further contended that during the said period, the Officer was not assigned with any duty and he was to remain in headquarters and not to leave without prior permission. It is not clear as to how he was assessed as 'very good' or 'outstanding' for the said period. According to him, inasmuch as the UPSC has not filed a Writ Petition, challenging the order of the Tribunal, it is not open for them to attack the findings and the ultimate decision of the Tribunal.

8. According to Mr.R.Viduthalai, learned Advocate General, as per G.O.Ms.No.11 P & AR (PER-R) Department, dated 05.11.1984, and subsequent Government Order in G.O.Ms. No.373 P & AR (PER-R) Department, dated 20.10.1993, prescribing the time limit with regard to writing of ACRs, which are mandatory in nature; the ACR for the period from 01.04.1993 to 15.07.1993, which was written only on 14.11.1994, reviewed on 19.01.1996 and accepted on 27.01.1996, cannot be accepted since it goes contrary to various Government Orders/instructions issued by the Government. He also commented that the petitioner was on 'compulsory wait' during the period between 01.04.1993 and 15.07.1993, for which period he was rated 'outstanding', and this fact raises serious doubt about the authenticity of the ACR. He also placed the original files relating to the petitioner.

9. We have verified all the relevant materials and considered the rival contentions projected on either side.

10. Before proceeding further, it is relevant to deal with the argument of the learned Additional Solicitor General on the finding of the Tribunal that the Select Committee Meeting held on 24.03.1999 was a fresh Select Committee Meeting and not a Review Selection Committee Meeting. He submitted that the doctrine of merger will apply, therefore, inasmuch the orders of the Tribunal and the High Court now merged in the order of the Supreme Court, it is only the finding of the Supreme Court that would apply, consequently, it cannot be said that the Select Committee which met

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on 24.03.1999 was a fresh Select Committee. He argued that the principle of constructive res judicata will apply and inasmuch as the contentions now raised by the petitioner were not taken in the earlier round of cases, he should not be allowed to advance arguments thereon.

11. In the light of the submissions relating to merger and res judicata, we verified the relevant materials, earlier proceedings and the orders passed therein. The doctrine of merger would have no application to the facts and circumstances of the case inasmuch as the Tribunal in the earlier round, the High Court as well as the Supreme Court have all rendered a finding that the earlier proceedings of the Select Committee held on 07.03.1995 were invalid inasmuch as the proceedings were conducted in violation of the interim order of a competent Tribunal. For these reasons, direction was issued for constituting a fresh Select Committee and to redo/undertake the entire process afresh. As rightly pointed out, inasmuch as the Tribunal, the High Court and the Apex Court gave the same reasoning, the doctrine of merger would have no application to the facts and circumstances of the case. Even otherwise, as pointed out, the final conclusions of the Tribunal in the earlier round of litigation were approved by the Supreme Court, hence, the reasoning and conclusions of the Tribunal have full effect.

The Tribunal directed the authorities to go through the entire process of preparation of panel for the year 1994-1995 afresh. The Supreme Court confirmed the entire order of the Tribunal and dismissed the Special Leave Petition. The direction that any party aggrieved by the selection is at liberty to approach the appropriate forum makes it clear that the order of the Tribunal was confirmed without any reservation. Even the Union of India had understood the said order in its correct perspective and accepted the recommendation of the Select Committee, and acting thereupon, issued Notification on 30.01.2004 and also rejected the representation of the first respondent by its order dated 09.06.2005. Inasmuch as the Appeals were dismissed, confirming the order of the Tribunal, it necessarily follows that the Supreme Court approved all the findings and the directions of the Tribunal and therefore, the proceedings for preparation of panel of 1994-1995 should be done de novo without any limitation.

12. Learned Additional Solicitor General orally took an objection that the present Writ Petitions are barred by principles of constructive res judicata. In the decision reported in AIR 1976 SC 1569 (Syed Mohd. S.Labbai vs. Mohd. Hanifa), the Hon'ble Supreme Court laid down four ingredients/conditions for maintaining the plea of res judicata before such plea can be given effect to, they are:

(i) that the litigating parties must be the same;

(ii) that the subject matter of the suit also must be identical;

(iii) that the matter must be finally decided between the parties, and

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(iv) that the suit must be decided by a court of competent jurisdiction.

Applying the above ratio, it is pointed out by the learned Senior Counsels for the petitioner that the first round of litigation viz., O.A. No.1154 of 1995, was between the promotees P.Sivanandi & others on the one hand and the Union of India, State Government and others on the other hand. The directly recruited I.P.S. Officers, who are R-1 in these Writ Petitions, were not parties to the said litigation. The names pointed out by the learned Additional Solicitor General were all only promotee IPS Officers and none of the directly recruited IPS Officers, viz., R-1 in the Writ Petitions, were parties. On a perusal of the materials, we are satisfied that the principle of constructive res judicata will not apply to the facts and circumstances of the case since,

a. The parties were not the same;
b. The point was never an issue; and
c. In the earlier round, the Tribunal expressly stated that it was not going into other contentions and left all those contentions open.

13. Now, let us consider as to whether the order of the Tribunal is in violation of the principles of natural justice and liable to be remanded as argued by Mr.Vijaynarayan.

It is brought to our notice that, during the course of hearing of the Application before the Central Administrative Tribunal, the Tribunal directed the Union Public Service Commission and the Government of India to produce the files in respect of the Select Committee's proceedings dated 07.03.1995 and 24.03.1999. From the files, the Tribunal found that, for the period from 01.04.1993 to 15.07.1993, the Reporting Authority wrote the Annual Confidential Report on 14.11.1994, the same was reviewed on 19.01.1996 and accepted on 27.01.1996. On this sole basis, the Application filed against the petitioner was allowed. Inasmuch the UPSC, at the time of placing the proceedings before the Tribunal, claimed privilege in view of the nature of the documents, the contents of the same were not shown to anyone. However, the details that were taken note of by the Tribunal from the documents of the UPSC were reflected in its Order itself. In view of the nature of documents and the privilege claimed, we are satisfied that there is no force in the contention raised by the learned Senior Counsel for the petitioner. In fact, even before us, the Chairman, UPSC, has filed an affidavit, claiming privilege, however, placed all the original files for perusal and decision of this Court. That being the position, we are satisfied that the petitioner cannot be allowed to contend that he was not given opportunity of meeting the finding that was put against him, accordingly, we reject the said contention.

14. Now, let us consider the reasoning of the Tribunal for allowing the Original Application of Respondent-1 herein.

15. It is not in dispute that, as per Rule, the Select Committee is expected to consider the ACRs for 5 years. As regards the petitioner, the relevant periods are,

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(a) 01.04.1989 to 31.03.1990
(b) 01.04.1990 to 31.03.1991
(c) 01.04.1991 to 31.03.1992
(d) 01.04.1992 to 31.03.1993
(e) 01.04.1993 to 31.03.1994

The Tribunal arrived at the conclusion that, since the ACRs for the period 01.04.1993 to 15.07.1993 were written by the Reporting Officer only on 14.11.1994, reviewed by the Higher Officer on 19.01.1996 and accepted by the DGP (Director General of Police) on 27.01.1996, there had been a considerable delay in writing the ACRs, therefore, the said ACR ought not to have been taken into account. In other words, the Tribunal has come to a conclusion that if an ACR is written belatedly the said ACR ought not to be taken into account. The Tribunal also relied upon G.O.Ms. No.11, dated 05.01.1984, for coming to such conclusion. In this regard, it is useful to mention that when the petitioner's name was excluded and when the Select Committee, which met on 17.03.1995 for inclusion of names in the 1994-1995 panel, the petitioner was graded as 'good', but the Select Committee met on 24.3.1999 pursuant to court orders, graded him the rating 'very good'. The Tribunal rendered a specific finding that the ACR written for the period 01.04.1993 to 15.07.1993 belatedly was the only factor which enabled the petitioner to get included in the Panel.

G.O.Ms.No.11, Personnel and Administrative Reforms (PER-R) Department, dated 05.01.1984, speaks about the system of maintaining personal files on Government Servants. Clause-4(3) of the Annexure to the said Government Order makes it clear that,

> the personal files should be written promptly by the reporting officer.
> (emphasis supplied).

Tamil Nadu Police Standing Orders (Volume-I, Chapter-XII) speaks about maintenance of personal files confidential sheets and submission of periodical reports on officers. It is made clear therein that all Deputy Inspector-General of Police including the Commissioner of Police and Additional Inspector-General of Police should submit to the Director-General of Police annually a Confidential Report (CR) on each of the Superintendents of Police covering the period from 1st April of a particular year upto 31st March of the succeeding year so as to reach him by 15th April. The Standing Orders also prescribe an elaborate procedure including the time limit for completion of the ACRs and submission of the same to the appropriate higher authority.

16. Mr.N.R.Chandran and Mr.Vijaynarayan, learned Senior Counsels, contended that the instruction inscribed in G.O.Ms.No.11 does not specifically provide for a time frame and there is no default clause, requiring the same to be ignored if written belatedly. According to them, the instruction only says that it should be written promptly.

Learned Advocate General, supporting the order of the Tribunal, placed reliance on G.O.Ms.No.373, P & AR (PER-R) Department, dated

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20.10.1993, imposing maximum time limit. By pointing out that this instruction came into effect only on 20.10.1993 long after the relevant period viz., 01.04.1993 to 15.07.1993, learned Senior Counsels appearing for the petitioner submitted that the said G.O. is not applicable and, in fact, the Tribunal did not rely upon the same. According to them, the instruction only prescribes the uniform time limit and does not envisage any consequence for non-compliance, if any.

Mr.I.Subramanian, learned Senior Counsel appearing for R-1, produced G.O. Ms.No.85, P&AR Department, dated 08.02.1996, wherein, a time limit of 90 days is prescribed to write a report by the officer demitting the office. As rightly pointed out, the instruction governs only an officer, who has been transferred, and this Government Order obliges the said Officers to write the report within 90 days after he is transferred, hence, the same is not applicable to the cases on hand.

17. ACRs are very important documents for advancement in the service career of a Government Servant. The ACRs are written by the superior officers, viz., a reporting officer, reviewing officer and accepting officer. It is the claim of the learned Senior Counsels appearing for the petitioner that the Government servant has no role in the matter of writing of the ACR, which determines his service prospects. Therefore, according to them, to hold that belated ACR should not be taken into account to consider the claim of the Government servant would violate his fundamental right under Article 16 of the Constitution of India, because his case for consideration cannot be affected by default, if any, by his higher officer. So long as he is not responsible for writing of the ACRs, the same cannot be excluded from consideration while considering his promotion. They further contended that, assuming the instructions are mandatory and should be followed, even then, explanation should be called for from the higher officers for not writing it promptly, but at the same time the said ACRS cannot be ignored from being considered. They also contended that if it is excluded merely because the Higher Officers delayed the matter, then it would be arbitrary, offending Article 14 of the Constitution of India. According to them, the only reasoning of the Tribunal for quashing the Select List is the acceptance of delayed ACR for the period 01.04.1993 to 15.07.1993 and, inasmuch as there is no statutory rules prescribing time limit for writing of the ACRs, since the instructions are regulatory and not mandatory, the order of the Central Administrative Tribunal, Madras Bench, is liable to be set aside.

18. As stated earlier, the Tribunal heavily relied on G.O.Ms. No.11, dated 05.01.1984, which contains consolidated instructions in respect of writing of ACRs. The said Government Order specifically states that ACRs have to be written 'promptly', on the other hand, it is the claim of the learned Senior Counsel for the first respondent, learned Additional Solicitor General and the Advocate General that belated ACRs cannot be considered particularly in the peculiar facts and circumstances of the cases on hand and in the background of other relevant particulars/aspects covering the issue of delay and also ascription of the

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rating 'very good' to the petitioner for the period he was put on 'compulsory wait'.

19. The UPSC, in para No.6.5 of its counter affidavit filed before the Tribunal, specifically submitted that the State Government furnished those ACRs/Part CRs in respect of two Officers, viz., Avudaiappan and Sivanandi, which were not made available to Select Committee that met on 07.03.1995 and they took into account those ACRs while assessing the officers as the same were amongst the records submitted to them. In para No.6.6., the UPSC tried to distinguish between the Select Committee and the Departmental Promotion Committee. In para No.6.4.3, the UPSC averred that any delay in recording of ACRs by reporting/reviewing/accepting officers cannot be held against the officer reported upon. The procedure regarding the assessment on incomplete ACRs, which is available in the counter affidavit filed by the respective parties as well as Swamy's compilation (Page-92), shows that, in the event of non-writing of one or more ACRs for any reason during the relevant period, the DPC should consider the ACRs for the year preceding the period in question and in any case, even if these are not available, DPC should take care about the CRs of the lower grade into account to complete the number of CRs required to be considered. If this is also not possible, all the available CRs should be taken into account. In para No.9.2.1 of the counter, the above provision has been extracted. As rightly pointed out, it means that the instructions as published in the above said book ought to be followed in letter and spirit. Admittedly, no statutory Rules govern the writing of ACRs and therefore, the Government of India and the Government of Tamil Nadu are competent to issue administrative instructions on a matter upon which, statutory rules do not exist.

20. It is contended on behalf of the petitioner that since some additional ACRs relied upon by the UPSC are within the mandatory 5 years' period, those ACRs which were written belatedly can be taken into consideration. It is also contended that G.O.Ms.No.11 P&AR Department, dated 05.01.1984, does not speak about the consequences regarding belated writing of ACRs and, as such, ACRS relating to the mandatory period, though written belatedly, can be taken into consideration.

21. We are unable to accept the said contention. To remove deficiencies and to improve quality and efficiency of the service, it should be ensured that suitability of candidates should be considered in an impartial manner which implies that the consideration of a particular candidate is not clouded by any extraneous matter/. The Officers, by whom the confidential reports are written, should give highest possible care so that the work, conduct, character and capability of the officers reported upon can be accurately judged from the recorded opinion. The officers should show fair assessment without any prejudices whatsoever with the highest sense of responsibility while recording the CRS about the officers working under them. As rightly pointed out by Mr.I.Subramaniam, learned Senior Counsel for R-1, in view of the conflicting stand taken by the

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State Government and the Director General of Police on the one hand and the UPSC on the other hand, the ACRs which were said to have been forwarded by the State Government to the UPSC became doubtful documents. Thus, it is undoubtedly clear that only the additional ACR for the period 01.04.1993 to 15.07.1993 tilted the scales in favour of the petitioner herein and he was graded as 'very good' by the Review Select Committee. It is not in dispute that the UPSC, independent of the grading given in the ACRs, can assess the candidates and grade them accordingly. We have already referred to G.O.Ms. No.11 P&AR, dated 05.01.1984, which contemplates that files should be written promptly by the reporting officers. Clause-7 of the said Government Order stipulates that in order to ensure that personal files are maintained correctly and regularly, the same should be scrutinized by the Head of the Departments in the case of officers, who belong to Group-A and B, and by officers specified by the Heads of Department in case of others. As per PSO No.117 of the Tamilnadu Police Standing Order, the personal files of officers whether officiating or holding sustaining appointments above the rank of Inspectors/Reserve Inspectors will be maintained by the Director General of Police. PSO No.119 prescribes that in order to keep the files in full and complete form as possible, they should be made up every half year and whenever there is a change in the immediate superior of subordinate concerned. As per PSO No.122, all DIG of Police including the Commissioner of Police and AIG of Police should submit to the DGP annually a Confidential Report on each Superintendent of Police covering for the period from 1st April of the particular year till 31st March of succeeding year so as to reach him by 15th April and it should be sent in triplicate as per form introduced in G.O.Ms. No.2993 Public Special-A Department dated 13.11.1973 and it should be used in respect of Non-Indian Police Service Officers.

In such circumstances, we are of the view that a strict approach has to be adopted and no leniency could be shown to compromise legitimacy.

22. On behalf of the UPSC, it was submitted that since there is no Rule prohibiting the UPSC from taking into consideration the full records available for the period from 1989 to 1994 and the records were provided by the State Government, it took into consideration the ACRs for the relevant period and assessed the 6th respondent, viz., the writ petitioner. Reliance was placed (in this behalf) on the following decisions,

a. 1989 4 SCC 671 (The Vali Pero vs. Fenando Lopez)
b. 1991 Supp. (2) ACC 151 (Union of India and others vs. R.S.Saini)
c. 1980 2 SCC 752 (Charles K. Skaria vs. C.Mathew)
d. 2003 (8) SCC 498 (P.T.Rajan v. T.P.M.Sahir)

to substantiate that the rules are not to be held as mandatory and even if any limitation is prescribed for performance, it is only directory and, as such, the UPSC, cannot be faulted for taking into consideration the ACRs sent by the State Government though written belatedly.

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23. As rightly pointed out, the ACR which the UPSC claims to have influenced them to make change in the gradation was not written promptly as per G.O.Ms.No.11. Further, the claim of no time limit does not carry any significance since the amendments made to the said G.O. specify April 15th as the time limit. Here, not only there was delay, but the same is inordinate and unexplained (emphasis supplied) and it came into existence much after the first committee meeting on 07.03.1995 and, as rightly pointed out by the counsel for the respondents, this has been done only to benefit the petitioner. Further, the second Select Committee which the UPSC refers to as the Review Selection Committee is only substituting the original committee and it cannot take note of any material that came into existence subsequent to 07.03.1995. In any event, even assuming that additional/missing/part ACRs are available on record, the same came into existence very belatedly and were written de hors rules and instructions of both the Government of India and the State Government. Strictly speaking, only such documents relating to the relevant period and which were in existence before the date of the First Select Committee Meeting alone should have been considered. In view of the stand taken by the State Government and the DGP that no additional ACR was made available to the UPSC, the very authenticity of the document becomes doubtful and as to how it reached the hands of the UPSC still remains a mystery and no explanation has been put forth by the UPSC in their counter affidavits filed before the Tribunal and in this Court.

24. We verified all the four decisions relied on by the learned Senior Counsel appearing for the UPSC and we are satisfied that the same are not applicable to the facts and circumstances of the present case since, in those decisions, the authenticity of the documents was not in dispute and no prejudice was caused, but, in the cases on hand, the ACRs were written very belatedly and in the light of the submission made by the learned Advocate General, the genuineness and authenticity of the said document is very much doubtful. It has also resulted in prejudice to the 1st respondent in the Writ Petitions as the writ petitioner has gone above the entire 1993 and 1992 batch of IPS officers all over India and got into 1991 Batch.

25. As observed in the Judgment reported in Syed Khalid Rizvi's case (cited supra), if laxity has been given legitimacy and deemed relaxation is extended it would not only upset the smooth working of the rules but also undo the prescribed ratio between promotee officers and direct recruits. It would also produce adverse effect at the all India level. Moreover, the concept of all India Services introduced to effectuate national integration by drawing persons from different regions by direct recruitment into concerned States Cadres would be defeated by manipulation. National integration would be disturbed and frustrated. Smooth implementation of the rules would be deflected and distortions in service would gain legitimacy and acceptability. In view of the same, it is clear that seniority plays a vital role in All India Services especially Indian Police Service and that no flexibility could be shown in

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favour of anyone to defeat the claim of the persons legitimately entitled to promotion.

26. Apart from G.O.Ms.No.11, dated 05.01.1984, which states that 'the personal files should be written promptly by the Reporting Officer', G.O.Ms. NO.373, P& AR (PER-R) dated 20.10.1993 prescribes the time limit for the submission of the Annual Confidential Report. It further specifies that the report should be sent in triplicate. The form introduced in G.O.Ms. No.2933, Public (Special-A) Department, dated 13th November, 1973, should be used for writing the confidential report on IPS officers of the rank of Superintendent of Police and pro-forma prescribed by the Government should be used in respect of non-Indian Police Service Officer. By the same date, the Director-General of Police will obtain confidentially from each Collector in triplicate his remarks on the Superintendent of Police of his district. Two copies of each report including that of the Collector will be forwarded by the Director-General of Police with his own remarks on each officer so as to reach the Government by the 1st May, the other copy (with the report of the Collector) being filed in the officer's personal file. The above provisions, prescribing the time limit with respect to ACRs, are mandatory in nature. However, it is the claim of the learned Senior Counsels for the petitioner that inasmuch as there is no statutory rules prescribing time limit for writing of ACR, those instructions are regulatory and not mandatory. In support of their claim, they also relied on,

a. 1983(1)SLR 119 – D.R.Chauhan vs. The Vice-Chancellor (Himachal Pradesh High Court)

b. 1995 (1) SLR Page 531 - Shri Shailendra Kumar Agnihotri v. Union of India & others (C.A.T. Guwahati Bench).

In addition to the same, learned Senior Counsels heavily relied on a Division Bench decision of the Karnataka High Court reported in WP Nos.2288/05 etc. Batch, dated 06.10.2005. The Division Bench held that there is no time limit in writing the ACR and the belated writing of the ACR will have no consequences whatsoever and the same would have to be taken into account for the purpose of consideration for promotion. Learned Senior Counsels for the petitioner pointed out that where the time limit is specified and no consequences flow from non-adhering to the time limit such instructions should be taken as directory and not mandatory. In support of their stand, they also relied on,

a. 2003 (8) SCC 498 – (cited supra)

b. 1991 Supp (2) SCC 151 (cited supra)

c. 1989 (4) SCC 671 (cited supra)

On the other hand, learned Advocate General submitted that the time limit within which the ACRs are to be submitted is to be treated as mandatory. In support of his contention, he relied on,

a. 2005 (5) SCC 598 (Ashok Lanka v. Rishi Dixit)

b. 2003 (8) SCC 498 (cited supra)

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c. 2003 (6) SCC 401 (Rai Vimal Krishna vs. State of Bihar)
d. AIR 1987 SC 1201 (State of Haryana v. P.C.Wadhwa).

27. Having gone through the Case Laws relied on by the respective counsel in support of their contentions, we deem it useful to refer the decisions relevant to the issue involved.

A. In 2005 (5) SCC 598, para No.53 is relevant, which reads as under:-

> " 53. The question as to whether a statute is mandatory or directory would depend upon the statutory scheme. It is now well known that use of the expression 'shall' or 'may' by itself is not decisive. The court while construing a statute must consider all relevant factors including the purpose and object the statute seeks to achieve. (see P.T.Rajan v. T.P.M.Sahir and U.P.SEB v. Shiv Mohan Singh). "

B. In 2003 (8) SCC 498, the following conclusions are relevant,

> " 45. A statute as is well known must be read in the text and context thereof. Whether a statute is directory or mandatory would not be dependant on the user of the words 'shall' or 'may'. Such a question must be posed and answered having regard to the purpose and object it seeks to achieve.
>
> 46. …..
>
> 47. The construction of a statute will depend on the purport and object for which the same had been used. …..
>
> 48. …..
>
> 49. Furthermore, a provision in a statute which is procedural in nature although employs the word 'shall' may not be held to be mandatory if thereby no prejudice is caused. …."

C. Para No.27 in 2003 (6) SCC 401 is relevant, which reads thus:-

> " 27. Nobody disputes that publication and the giving of notice to persons likely to be affected by the assessment list is a must. The appellants have admitted publication of the assessment lists in three newspapers. It is not their case that such publication did not serve the purpose of notifying those who might be affected by the assessment lists, of their existence. Indeed it appears to us that the requirement to notify people by beat of drum is an anachronism which appears to be inappropriate in the present day and age in a large city like Patna. The High Court's apprehension that

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"holding this provision as directory is likely to cause confusion and mischief in future and it is not for this Court to substitute the wisdom of the legislature with its own by holding that notice by newspaper will be sufficient in place of notice of the spot by beat of drum and placards."

is unfounded both in law and in fact. It is an elementary principle of interpretation that words in statutory provisions take their colour from their context and object, keeping pace with the time when the word is being construed. When or where no other means of effective publication is available, no doubt, announcing the assessment list by beat of drum and by displaying placards would have to be complied with. Where equally efficacious, if not better, modes of publication are available, it would be ridiculous to insist on an obsolete form of publication as if it were a ritual. Had the High Court found that publication by newspapers was not effective enough to notify the public, the assessment list could not be given effect to unless publication was properly made. There is no such finding. On the other hand, publication through newspapers, is now an accepted form of giving general notice. Therefore, we have no hesitation in holding that the portion of Section 149(1) which deals with the manner of publication, as opposed to the requirement for publication per se, is directory. Since there has been sufficient compliance in effecting the intention of the legislature to give notice to the public at large in the city of Patna, we cannot hold that the assessment lists prepared on the basis of the 1993 Rules are required to be set aside."

D. The conclusion arrived at by the Supreme Court in AIR 1987 SC 1201 is of much relevance, which reads thus:-

" 14. The whole object of the making and communication of adverse remarks is to give to the officer concerned an opportunity to improve his performances, conduct or character, as the case may be. The adverse remarks should not be understood in terms of punishment, but really it should be taken as an advice to the officer concerned, so that he can act in accordance with the advice and improve his service career. The whole object of the making of adverse remarks would be lost if they are communicated to the officer concerned after an inordinate delay. In the instant case, it was communicated to the respondent after twenty seven months. It is true that the

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> provisions of rules 5, 6, 6A and 7 are directory and not mandatory, but that does not mean that the directory provisions need not be complied with even substantially. Such provisions may not be complied with strictly, and substantial compliance will be sufficient. But, where compliance after an inordinate delay would be against the spirit and object of the directory provision, such compliance would not be substantial compliance. In the instant case, while the provisions of Rules 5, 6, 6A and 7 require that everything including the communication of the adverse remarks should be completed within a period of seven months, this period cannot be stretched to twenty seven months, simply because these Rules are directory, without serving any purpose consistent with the spirit and objectives of these Rules. We need not, however, dilate upon the question any more and consider whether on the ground of inordinate and unreasonable delay, the adverse remarks against the respondent should be struck down or not, and suffice it to say that we do not approve of the inordinate delay made in communicating the adverse remarks to the respondent. "

The above case laws would make it clear that the provision in a statute, which is procedural in nature and employs the word 'shall', if it is not prejudicial to any one, may not be held to be mandatory. It implies that if the delay causes prejudice to others, it has to be construed as mandatory. On behalf of the respondents, it is specifically contended that consideration of delayed ACRs resulted in prejudice to the 1st respondent in the Writ Petitions as the writ petitioner has gone above the entire 1993 and 1992 batch of IPS officers all over India and got into 1991 Batch. It is also clear that even if the instructions are directory and not mandatory, that does not mean that the directory provisions need not be complied with even substantially. As observed by the Apex Court in AIR 1987 SC 1201 (cited supra), where compliance after an inordinate delay would be against the spirit and object of the directory provision, such compliance would not be substantial compliance. In view of the above mentioned legal principles, we do not approve the inordinate and unexplained delay in reviewing, accepting and making the ACR of the petitioner. Even if the provision is directory in nature, substantial compliance of the provision is necessary. In the present case for the period 01.04.1993 to 15.07.1993, the ACR was written only on 14.11.1994, reviewed on 19.01.1996 and accepted on 27.01.1996.

28. As rightly argued by the learned Additional Solicitor General and the Advocate General, the above ACR, though written for a period marginally longer than three months, was written after considerable lapse of time, viz., one year and few months. Thus, we are of the view that this is clearly contrary to the instructions issued by the Government. The ACR that was written belatedly or beyond the prescribed

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period would not be valid in the eye of law though it related to the said period, if it prejudicially alters the seniority of others. Though learned Senior Counsels appearing for the petitioner highlighted that because of the lapse on the part of the Senior Officers, the service career of the petitioner should not be affected, as rightly demonstrated by the learned Senior Counsel for the first respondent, inordinate delay in reviewing the ACR and forwarding the same for decision undoubtedly affected the seniority of R-1 and others. As observed earlier, the very object of writing of the ACRs is to apprise a police officer's performance either positively or negatively; in the former case, it aims at rewarding him and in the latter case, it is to enable him to improve his performance. Courts have, on various occasions, held that ACRs must be written at the earliest every year. It is well established that writing the confidential reports objectively and constructively at the earliest would pave the way for improving efficiency and attaining excellence in service. In this regard, the following conclusions of their Lordships of the Supreme Court in para No.4 of the decision reported in 1997 (4) SCC 7 (State of U.P. v. Yamuna Shanker Misra), are relevant,

> " 4. ….. It is needless to emphasise that the career prospects of a subordinate officer/employee largely depends upon the work and character assessment by the reporting officer. The latter should adopt fair, objective, dispassionate and constructive commends/comments in estimating or assessing the character, ability, integrity and responsibility displayed by the officer/employee concerned during the relevant period for the above objectives if not strictly adhered to in making an honest assessment, the prospect and career of the subordinate officer would be put to great jeopardy. The reporting officer is bound to lose his credibility in the eyes of his subordinates and fail to command respect and work from them. The constitutional and statutory safeguards given to the government employees largely became responsible to display callousness and disregard of the discharge of their duties and make it impossible for the superior or controlling officers to extract legitimate work from them. The writing of the confidentials is contributing to make the subordinates work at least to some extent. Therefore, writing the confidential reports objectively and constructively and communication thereof at the earliest would pave way for amends by erring subordinate officers or to improve the efficiency in service. At the same time, the subordinate employee/ officer should dedicate to do hard work and duty; assiduity in the discharge of the duty, honesty with integrity in performance thereof which alone would earn his usefulness in retention of his service. Both would

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contribute to improve excellence in service. ….. "

The following conclusion arrived at by the Supreme Court in the decision reported in 1997 (9) SCC 287 (Union of India v. N.R.Banerjee) is also relevant,

> " 9. It would, thus, be seen that the authorities are required to anticipate in advance the vacancies for promotion on regular basis including long-term deputation posts and additional posts created and then to take the action plan in finalizing the ACRs, preparation of the select list and place necessary material before the DPC for consideration of the candidates within the zone of consideration, as are found eligible for the relevant year/years.
>
> 10. The DPC in the present case was directed to consider the cases of all the eligible candidates within the zone of consideration so that there will not be any heart-burning among the eligible persons whose claims have been withheld for consideration for promotion to the higher post. In Syed Khalid Rizvi vs. Union of India the mandatory duty of the preparation of the select list of the officers for promotion to the All India Services has been indicated in para 35 of the judgment at p. 605 thus:
>
> " We, therefore, hold that preparation of the select list every year is mandatory. It would subserve the object of the Act and the rules and afford an equal opportunity to the promotee officers to reach higher echelons of the service. The dereliction of the statutory duty must satisfactorily be accounted for by the State Government concerned and this Court takes serious note of wanton infraction."

Though learned Senior Counsels appearing for the petitioner heavily relied on the Division Bench decision of the Karnataka High Court in W.P. Nos.2288 of 2005 etc., dated 06.10.2005, as rightly pointed out by the learned Additional Solicitor General and the Advocate General, in the said Judgment, the Court has categorically held that if for any period, the confidential report of an officer is not available for any reason whatsoever, the DPC should consider the CRs of the year preceding the period in question to complete the number of CRs required to be considered. In the instant case, as rightly pointed out, the Select Committee erroneously considered the ACR of the petitioner for the period 01.04.1993 to 15.07.1993 as the said ACR was written reviewed and accepted belatedly in violation of the prescribed time-limit.

29. Learned Advocate General, by referring to various case laws of the Supreme Court as well as the High Court, viz.,

A. 2005 (3) CTC 4 (The State of Tamil Nadu v. R.Karuppiah)

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B. 1998 (4) SCC 154 (State of A.P. vs. Radhakishan)

C. 2005 (5) CTC 380 (Obaidhullah, A. vs. State of Tamil Nadu)

D. 2005 (4) CTC 403 (Mahadevan, P.V. vs. M.D., Tamil Nadu Housing Board)

pointed out that just as delay vitiates inquiry, it also defeats the purpose of ACRs. In those cases, the Supreme Court as well as the High Court after finding that the delay in departmental enquiry vitiates the enquiry, quashed the entire disciplinary proceedings. If we apply the same analogy, in view of the fact that undue and unexplained delay defeats the purpose of ACRS and also affects the interest of other officers including his seniors, consideration of material, extraneous in nature, and the result arising therefrom shall be held to be invalid.

30. With regard to the submission pertaining to the remarks written for the period between 01.04.1993 and 15.07.1993, it is relevant to point out that ACR of the petitioner relating to certain period within the five year relevant period of 1989-94 was not made available during the select committee meeting held on 07.03.1995, consequent to which, the ACR for the period 1988-89 was taken into account leading to the overall grading for the petitioner to be as 'good', however, for the Select Committee meeting held on 24.03.1999 the ACR for the missing period, which was not available in the year 1995, was made available leading to the different grading to be given as a result of which, the overall grading of the petitioner in the Select Committee Meeting held on 24.03.1999 has been 'very good'. The Tribunal, while agreeing with the UPSC that the Select Committee Meeting in 1999 was to be a fresh one, held that from the assessment sheets submitted by the UPSC, it is seen that the Select Committee considered the ACRs ending for the period March 1994, which included the ACR for the period 01.04.1993 to 15.07.1993, written on 14.11.1994, but reviewed only on 19.01.1996 and accepted on 27.1.1996, being belated and contrary to the instructions issued by the Government and therefore ought not to have been considered by the Committee or the UPSC. The Tribunal further held that this additional ACR had the effect of changing the overall grading of the petitioner (who was respondent No.6 before the Tribunal) and that the same amounted to the UPSC having decided on the basis of impermissible documents to improve the grading given to him, though it may relate to the reckonable period. On the basis of the above conclusions, the Tribunal quashed the Select List.

31. Assailing the above conclusions of the Tribunal, learned Senior Counsel appearing for the UPSC has argued that such conclusions are baseless and contrary to the facts on record. He pointed out that even when ACR for the said period viz., 01.04.1993 to 15.07.1993 was made available for the Select Committee held on 24.03.1999, the Committee did not change the grading for the year 1993-94. In other words, according to him, although the ACR for the above period was made available for the Select Committee held on 24.03.1999, the Committee and the UPSC had graded the petitioner only as 'good' for the year 1993-94, which was the same grading given to the petitioner for the year 1993-94 in the meeting held on 07.03.1995. By pointing out the same, it is contended by the learned

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Senior Counsel for the UPSC that the Tribunal erroneously assumed that this ACR for the period 01.04.1993 to 15.07.1993 had the effect of changing the overall grading of the petitioner in the meeting held on 24.03.1999.

32. In view of the above submissions, we verified the original records submitted to this Court in a sealed cover, particularly the grading sheet. It is true that the grading for the petitioner for the year 1993-94 remains the same in respect of the meeting held on 07.03.1995 and 24.03.1999. Even if we accept the ACR for the period in question referred to above, it did not bring about any change either in the grading for the year 1993-94 or for the overall grading of the petitioner. A perusal of the original file shows that in the Select Committee meeting held on 07.03.1995, the grading 'good' was awarded for 1992-93 and in the meeting held on 24.03.1999, the rating was 'very good' for the said period namely 1992-1993. In spite of our best efforts, we are not able to understand as to how the grading 'good' was changed to 'very good' in the Select Committee Meeting held on 24.03.1999 without any additional material. Even if we accept that some additional material was furnished by the State Government in the meeting held on 24.03.1999, admittedly, it relates to the period 01.04.1993 to 15.07.1993. The remarks offered for the said period admittedly are not applicable to 1992-93. Though learned Senior Counsel for the UPSC has argued that the change in the grading given by the UPSC for the year 1992-93 as 'very good' as against the grading 'good' given by the Committee in the meeting held on 07.03.1995 was on account of the fact that the missing ACR for part of the year 1992-93 had been made available in 1999, no supportive material is either available or brought to our notice except the assessment for limited period 01.04.1993 to 15.07.1993. In such circumstances, though we are conscious of the fact that neither the Tribunal nor this Court is supposed to review the decision of the Select Committee as appellate authority, in the absence of any material and proper explanation, we hold that the said decision of the Union Public Service Commission cannot be accepted. We find substance in argument of the learned counsel for the respondents and justification in the conclusion arrived at by the Tribunal.

33. It is not in dispute that the Select Committee is expected to consider the ACRs for five years starting from 01.04.1989 to 31.03.1994. The additional material, viz., ACRs for the period 01.04.1993 to 15.07.1993, which falls within the prescribed period, as pointed out earlier, written by the reporting officer only on 14.11.1994, reviewed by the Higher Officer on 19.01.1996 and accepted by the DGP on 27.01.1996 and, thereafter, the same was said to have been forwarded to the UPSC. The Tribunal came to the conclusion that any document which came into existence subsequent to the cut off date for the select year 1994-95, ie., after 31.3.1994, cannot be accepted. Learned Additional Solicitor General, while pointing out that the said conclusion is correct in law, relied on a decision of the Apex Court reported in 1993 Supplement 4 SCC 441 (Air Vice Marshal S.L.Chhabra v. Union of India). In that case, the adverse remarks of

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the year 1986 came to be expunged sometime in January-February 1989, but, because of the said adverse remarks, he was denied promotion by the Selection Board of 1988 but the High Court as well as the Supreme Court negatived the contention that when once the adverse remarks were subsequently set aside, his promotion should relate back to the date on which he ought to have been promoted. This fortifies the legal position that any qualification which came into existence subsequently and which was not available at the time when the Select Committee considered the claim of the persons cannot be taken into account as that would tantamount to giving promotion with retrospective effect and also to improve the chances of promotion by taking into account subsequent qualifications. Again, the Supreme Court held in the decision reported in 1993 Supp. 3 SCC 168 (Rekha Chaturvedi vs. University of Rajasthan) that the crucial date for consideration of the qualifications would be last date for receipt of applications and not the date of selection. Any decision to the contrary need not be countenanced in law for the reason that the date of selection is invariably uncertain.

34. Apart from the factual and legal position as highlighted above, one another vital feature is that though the UPSC vehemently attacked the order of the Tribunal, the fact remains, it has not challenged the same by way of filing a Writ Petition. It is true that, as an independent authority, they are entitled to place the records and ultimately it is for the Court to decide the issue. As rightly pointed out by the Additional Solicitor General, neither the Central Government nor the UPSC chose to challenge the impugned order of the Tribunal dated 05.05.2006. The stand of the Central Government cannot be subjected to any criticism of being inconsistent since as rightly pointed out by the learned Additional Solicitor General, on reappraisal of the facts, a party to the litigation is entitled to take a different stand on the question of law arising out of the said facts and, as such, the stand of the central Government cannot be frowned at. In this regard, it is useful to refer to para No.7 in the Judgment of the Supreme Court reported in 1996 (6) SCC 559 (P.Nallammal v. State), which reads as follows:-

> " 7. The Union of India was made a respondent before the Madras High Court and one Under-Secretary to the Government of India had filed a counter-affidavit therein on 1.12.1998 conceding to the legal position espoused by the appellants. But Shri V.R.Reddy, learned Senior Counsel now appearing for the Union of India strongly supported the stand adopted by the State of Tamil Nadu. The volte-face of the Union of India cannot be frowned at, for, it is open to the State or Union of India or even a private party to retrace or even resile from a concession once made in the court on a legal proposition. Firstly, because the party concerned, on a reconsideration of the proposition could comprehend a different construction as more appropriate. Secondly, the construction of

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> statutory provision cannot rest entirely on the stand adopted by any party in the lis. Thirdly, the parties must be left free to aid the court in reaching the correct construction to be placed on a statutory provision. They cannot be nailed to a position on the legal interpretation which they adopted at a particular point of time because saner thoughts can throw more light on the same subject at a later stage."

Aforetiarari UPSC also cannot be permitted to defend their action once again before Court since they also, by not agitating the matter by filing writ petition against the impugned order of the Tribunal, deemed to have submitted to the said order. No doubt, they are entitled to place the records and point out the factual and legal position.

35. Finally, now let us consider the assessment made during the period between 01.04.1993 and 15.07.1993. It is not in dispute that the petitioner was on 'compulsory wait' during the said period and, for this period, he was rated as 'outstanding'. Learned counsel for the respondents heavily commented that the said fact raises serious doubt about the authenticity of the ACR. When the Writ petitioner was on compulsory wait, as ordered by the Government, he was not performing duties during this period. As we observed in the earlier part of our order, the objective of the ACR is to assess the performance of the Officer and when in law there was no performance of any official duty from 01.04.1993 to 15.07.1993 by the Writ petitioner there would no question of any ACR and it was therefore noted on the earlier occasion that it was not available. In this regard, it is brought to our notice by the learned Senior Counsels appearing for the petitioner that a person on compulsory wait is deemed to be on duty and in this case, according to them, he was assisting his senior officer. It is also brought to our notice that the period of compulsory wait was regularised as duty vide G.O.Rt. No.2994 Home (Police -II) Department, dated 14.10.1993. In such circumstances, according to them, the said document viz., ACR for the period 01.04.1993 and 15.07.1993, is not a questionable document, and the Tribunal eschewed the same only on the ground that it was belated. It is also highlighted by the learned Senior Counsels that the petitioner was on compulsory wait in the then Dindigul Anna District from 08.04.1993 to 07.07.1993 as per the orders of the DGP, vide proceedings dated 05.07.1993. It is also submitted that, pursuant to the same, the petitioner was directed to remain at Dindigul for further postings where he had to wait for more than 3 ½ months. The officers, who are on compulsory wait, have to carry out the instructions of their immediate seniors. According to the learned Senior Counsels, the Superintendent of Police, Dindigul, utilized the services of the petitioner and assessed his performance as outstanding for the good work alone. It is further pointed out that since that period was considered as duty as per G.O.Rt. No.2994, dated 14.10.1993, communicated in C.O.Endt.Rc 6663/GBII (1) 93, dated 04.11.1993, an assessment is necessary for a period more than three months and hence the reporting officer rightly initiated the ACR, in such circumstances, it is pointed out that it is not correct to say that the same is against the Rules.

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36. On the other hand, it is pointed out on the side of the respondents that an Officer on compulsory wait cannot be drafted to any duty by way of assistance to the superior officer since the reporting authority (Mr.Shailendara Babu, IPS) formerly Superintendent of Police, Dindigul, had stated that the writ petitioner assisted him in his work. It is further pointed out that according to the orders of compulsory wait, the officer is not assigned any duty and he has to remain in the headquarters and should not leave without prior permission. It is also brought to our notice that the petitioner was placed under the charge of a different officer ie., DIG (Admn.), in such circumstances, it was pointed out that the so called ACR of the writ petitioner for this period can only be said to be a suspecious document which was brought into existence for the first time to boost up the claim of the writ petitioner when the matter had to be considered afresh pursuant to the orders of the Tribunal, confirmed by the Supreme Court. As rightly pointed out, the Select Committee did not indicate as to the nature of the ACR and as to how the said ACR for a limited period and which was stated to be not available for certain reasons came into existence subsequently. Though it is stated that only during the period between 01.04.1993 and 15.07.1993, the petitioner was rated as 'outstanding', as rightly pointed out by the Additional Solicitor General and the Advocate General, when he was placed on compulsory wait, it is not understandable as to how he was rated as 'outstanding' for the said period.

37. In addition to the same, even this assessment was written by the Reporting Officer only on 14.11.1994, reviewed by the Higher Officer on 19.01.1996 and accepted by the DGP on 27.01.1996. All the above factual details support the stand of the respondents that the ACR of the writ petitioner for the said period can only be said to be 'suspecious document' which was brought into existence for the first time for the purpose of boosting up the claim of the petitioner.

38. Learned Senior Counsels appearing for the petitioner commented the conduct of the Government of India in withdrawing the counter affidavit filed by them. It is also pointed out that on behalf of Government of India, counter affidavit was filed on 15.06.2006 in USR No.3978 of 2006. According to them, the said counter which was served on the counsel for the petitioner is substantially the same as that was filed before the Tribunal and it supports the case of the petitioner and the same cannot be withdrawn without the leave of the Court. Learned Additional Solicitor General pointed out that the said counter affidavit was filed by the previous standing counsel without proper authority and that, immediately after realizing the mistake, the said counsel wrote a letter to the Registry and, on the basis of his request, the Registry returned the counter and the fact remains that, at the time of hearing of the writ petitions, no counter of the Union of India was pressed into service. Learned Additional Solicitor General made oral submissions on the basis of the materials supplied to him. In view of the fact that there is no counter affidavit of the Union of India before this Court and

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relied on by the Additional Solicitor General, we find no merit in the contention relating to the same.

39. Before winding up, it is relevant to point out that claims of candidates for promotion have to be considered objectively and dispassionately. The committee is duty bound to proceed on an impartial manner with a high sense of responsibility and should not leave any room for an allegation of inclination in favour of an individual unjustly and deviation from the procedure and obligation imposed upon it to follow. If the same trend as could be seen in the present cases is let to continue, it would emasculate the operation of Rules and Regulations and fraught with grave imbalances and chain reaction.

It is not in dispute that, in the earlier round of litigation, the entire order of the Central Administrative Tribunal came to be confirmed by the Supreme Court. It is the specific finding of the Tribunal in O.A. Nos.595/05 etc. that any document which came into existence subsequent to the cut off date viz., 31.3.1994. shall not be taken into consideration, making it clear that the select list shall be prepared strictly by considering only the records that ought to have been considered at the first meeting held in 1995. When such was the direction given, the UPSC should not have taken into consideration any additional material as any deviation would on the one hand upset the order of seniority at all India Level and on the other hand go in flagrant violation of the order of the Tribunal.

Further, the rating given to the petitioner, on the basis of the assistance rendered by him to his superior officer during the period he was placed on 'compulsory wait' cannot be taken as a relevant factor in making a positive entry that too as 'outstanding' in the ACR, and such entry cannot be permitted to stand as a base to push back other Officers, whose entries and ratings do not stem from such root and who are standing ahead in the row by way of seniority and other relevant aspects. Even by applying simple logic, it can be inferred that it is a clear case of boosting up the cause of the petitioner as otherwise there would not have been such denials and rebuttals, in that, the State Government denies the forwarding of additional material while the UPSC struggles to confirm the receipt of the same from the Government. A person put on compulsory wait and not assigned with works involving his independent opinion and action, cannot be equated with others, and the grading given to him for such period as outstanding cannot be allowed to be used as a source to overtake others and to deprive them of their legitimate expectation and right regarding promotion. Had the committee made its own assessment and awarded appropriate grading on the basis of all relevant aspects relating to the petitioner independent of the so called additional/extraneous documents, our view would have differed.

However, we cannot have a soft approach, because, in matters of promotion relating to Indian Police Service, there should be strict adherence to rules and procedure, particularly when the matter went to

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adjudication and a direction was given regarding the course to be set in motion. Any deviation would lead to distortion and land up in imbalance in the ratio and upset the smooth functioning of the scheme, defeating the very object of the All India Police Service. It is well known that the State Government is enjoined to send the select-list to the UPSC, which after considering the objections, if any, of the Central Government and the State Government and the views of the Committee, would approve the list with such modifications as it may be deemed just and proper. When the State Government emphatically denies having sent the Additional ACR, thereby, the authenticity of the said document lurks in suspicion, such extraneous material can never be permitted to be used to favour the petitioner that too defeating the rights of others, hence, we see no ground to interfere with the well considered order of the Tribunal, accordingly, the same has to be upheld. In this view of the matter, we are unable to accept the contentions raised by the learned counsel for the petitioner.

Consequently, all the writ petitions fail and they are dismissed. No costs. Connected Miscellaneous Petitions are closed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

JI.

To

1. The Secretary, Union of India,
Ministry of Home Affairs,
North Block, New Delhi.

2. The Secretary, Union Public Service Commission,
New Delhi.

3. The Principal Secretary,
State of Tamilnadu, Home Department,
Fort St. George, Chennai 600 009.

4. The Director General of Police, Tamil Nadu, Mylapore,
Chennai-600 004.

5. The Registrar, Central Administrative Tribunal
Madras Bench, Chennai 600 104.

5 ccs to Mr.K. Sridhar, Advocate, sr. 50302
7 ccs to Mr.S.Arivazhagan, Advocate, Sr. 50163
5 ccs to Government Pleader, sr. 50573 to 50576 and 50578

WPs.15791 to 15795 of 2006.

TEJ (CO)
kk 31/10

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